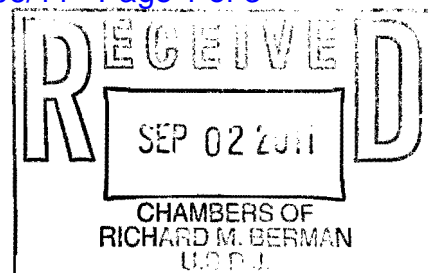


SHEARMAN & STERLING LLP

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

WWW.SHEARMAN.COM | T +1.212.848.4000 | F +1.212.848.7179



rschwed@shearman.com
212-848-5445

September 2, 2011

BY HAND

Honorable Richard M. Berman
United States Courthouse
500 Pearl Street, Room 21B
New York, New York 10007

MEMO ENDORSED

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Emmet & Co., Inc. and First Manhattan Co. v. Catholic Health East and Merrill Lynch & Co., Inc.
No. 11-Civ.-3272 (RMB) (AJP)

Dear Judge Berman:

We represent defendant Catholic Health East ("CHE"). In accordance with Rule 2.A of the Court's Individual Rules, we write to request a pre-motion conference in advance of CHE's expected motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Background

Plaintiffs Emmet & Co. ("Emmet") and First Manhattan Co. ("FMC") brought this action to challenge CHE's exercise of its right to redeem "callable" bonds. The indentures governing the bonds at issue (the "Indentures") expressly allowed CHE, at its sole discretion, to redeem the bonds for par value. CHE exercised that right as part of a transaction (the "Transaction") whereby bondholders were given the option of tendering their bonds for a price of 101 or having their bonds redeemed for par value (100). Plaintiffs acknowledge that CHE had the right to redeem the bonds but nonetheless claim that CHE breached the Indentures because CHE did not redeem the bonds it obtained in the tender offer (by purchasing its own bonds from itself).

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On May 13, 2011, Emmet commenced this action in New York state court. After CHE removed the action, on May 18, 2011, this Court denied Emmet's requests for a TRO and preliminary injunction because Emmet failed to establish irreparable harm and the Court was "not persuaded that [Emmet] ha[d] demonstrated probability of success on the merits of its underlying breach of contract claims." The Transaction was consummated the same day. On July 27, 2011, Emmet filed a first amended complaint, adding FMC (a non-bondholder purportedly suing on behalf of as yet unidentified clients) as a plaintiff and Merrill Lynch & Co., Inc. as a defendant. Emmet has recently informed the parties and the Court that it will seek leave to file a second amended complaint.

Grounds for CHE's Proposed Motion to Dismiss

First, plaintiffs lack standing. Each of the Indentures contains a "no action" clause that requires bondholders to satisfy certain conditions in order to bring suit: (i) notice to the trustee of an event of default; (ii) written request of the trustee to institute suit made by owners of at least 25% of the outstanding principal amount of the bonds; (iii) an offer of security and indemnity to the trustee; and (iv) refusal or neglect by the trustee to comply with the request. Plaintiffs have not satisfied any of these conditions, and the complaint should be dismissed on this basis alone. *See, e.g., Teachers Insurance and Annuity Assoc. of America v. Crimi Mae Services Ltd. Partnership*, 681 F. Supp. 2d 501, 509 (S.D.N.Y. 2010) ("Satisfaction of [the no-action clause] ... was required prior to the commencement of this action."); *Victor v. Riklis*, 1992 WL 122911, at *6 (S.D.N.Y. May 15, 1992) (same).

